88-388

Supreme Court, U.S.
FILED
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No. 88 -

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

FAIRNESS IN MEDIA, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, AND CBS, INC.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 6, 1988

QUESTION PRESENTED

Did the Court of Appeals flagrantly flout the standards for reviewing administrative agency investigative inaction decreed in *Dunlap v. Bachowski*, 421 U.S. 560 (1975) and *Heckler v. Chaney*, 470 U.S. 821 (1985) in holding that a single, terse uninquisitive letter sent by the Federal Communications Commission to its investigative target– CBS Inc.– constituted a reasonable investigation of allegations and evidence that its control had passed illegally to its dominant 24.9 percent stockholder and chief executive officer Mr. Laurence Tisch?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Fairness in Media, the respondents Federal Communications Commission and the United States of America, and intervenor CBS, Inc..

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner Fairness In Media respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in the above-titled proceeding on June 8, 1988.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the District of Columbia Circuit is unreported. It is reprinted in the appendix to this petition, p. 1a, *infra*.

The opinions of the Federal Communication Commission are reported sub. nom. *Letter to William S. Paley*, 1 F.C.C. Rcd. 1025 (1986), *recon. denied*, 2 F.C.C. Rcd. 2274 (1987), and are reprinted in the appendix to this petition at p. 3a, *infra*.

JURISDICTION

Petitioner sought review pursuant to 47 U.S. Code 402 (a) in the United States Court of Appeals for the District of Columbia Circuit of the Federal Communications Commission's refusal to investigate an alleged illegal transfer of control of CBS, Inc..

The Court of Appeals entered a judgment and per curiam opinion affirming the Commission's inaction on June 8, 1988. See p. 1a, *infra*. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the District of Columbia Circuit is invoked under 28 U.S. Code 1254 (1).

STATUTES INVOLVED

1. 47 U.S. Code 310 (d).

Assignment and transfer of construction permit or station license.

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

2. 5 U.S. Code 706 (2)(A). Scope of Review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

STATEMENT OF THE CASE

Section 310(d) of the Communications Act, 47 U.S. Code 310(d), is a congressional cornerstone for the regulation of broadcasters. It requires prior approval by the Federal Communications Commission of any transfer of ownership or control of a licensed broadcaster. The importance of section 310(d) is underscored by the Commission's historical aggressiveness in pursuing alleged violations. See e.g., *Southwest Texas Public Broadcasting Council*, 85 F.C.C.2d 713, 716 (1981) (field investigation of small radio station). The Commission has invariably initiated enforcement action against a person it believes obtained control of a licensee in violation of section 310(d).

Fairness in Media (FIM) is supported by 15,000 active contributors who are automatic members. It is devoted to combating bias in the broadcast media. FIM has taped, monitored, and analyzed CBS' network for years, has filed several programming complaints with a CBS TV affiliate licensed to Durham, North Carolina (WTVD), and complained to the Commission regarding CBS' news bias.

In 1986, Loews Corporation, through its chairman, Laurence A. Tisch[1] seemingly acquired *de facto* control of CBS, Inc. by purchase of 24.9 percent of its voting stock coupled with other earmarks of corporate control without required prior approval of the Commission.

Approval proceedings conducted by the Commission afford organizations, citizens, or viewers an opportunity to protest a transfer of control as contrary to the public interest. See 47 U.S. Code 308, 309(b), (d), 310(d). Further, an affirmative finding of a control transfer would compel CBS to divest one of its television stations in either Philadelphia or New York, and radio stations in those twin cities plus Los Angeles and Chicago under the Commission's multiple ownership rules.[2]

On September 12, 1986, FIM requested the Commission to investigate the facts surrounding the apparent *de facto* control of CBS by Mr. Tisch. FIM submitted to the F.C.C. a wealth of public information that provided the Commission with investigative leads and analytical guidance. FIM noted that by August 1986, Loews had purchased approximately 25 percent of the common stock of CBS, and that Tisch was a board member. He subsequently became president and chief executive officer of the company on January 14, 1987. 2 F.C.C. Rcd. at 2275 n.1 (p. 14a, infra). It further observed the expert consensus that Mr. William Paley, founder of CBS, had earlier controlled the company with an 8 percent ownership share prior to his retirement. See also *Columbia Broadcasting System, Inc.*, 7 R.R. 298 (1951) (indicating that Paley and two other CBS board members controlled CBS).

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[1] Because Loews Corp. operates through Mr. Tisch, reference to the latter is used hereafter to denote Loews' alleged *de facto* control of CBS.

[2] See 47 C.F. R. 3555(a), (b), and NOTE 4. The rules generally proscribe ownership of co-located broadcast facilities, but "grandfather" existing combinations, subject to divestiture upon transfer of control. CBS owns grandfathered TV-radio facilities in New York, Philadelphia, Los Angeles, and Chicago. Its New York and Philadelphia TV stations are also grandfathered because of overlapping signal ranges. See *1987 Television & Cable Factbook: Stations Volume*, p. A-1264.

FIM also pointed to a published statement by the president of Loews, Mr. Tisch's brother, in the March 24, 1986 issue of *USA Today* avowing that "the eventual goal [of Loews] is to control CBS and operate it as a first-class broadcasting company the way it was and the way it can and should be."

Additionally noted was Laurence Tisch's refusals to disavow the statement when requested by CBS executives, or to sign a "standstill" agreement pledging Loews to purchase no more than 25 percent of CBS stock.

The filings included an assertion of Fred Friendly, former president of CBS News, that "We used to call it [CBS] Bill Paley's candy store. Now its the Tisch-family candy store." Reputable organs of the print media, such as *Time*, *Newsweek* and *The Wall Street Journal*, all carried stories describing Mr. Tisch as having taken control of CBS.

Stockholders of CBS also complained of a *de facto* transfer of control to Mr. Tisch. During October 1986, a stockholder's derivative suit was filed against Mr. Tisch and other members of the CBS board of directors in the United States District Court of the Virgin Islands, Division of St. Croix. *CBS, Inc. derivatively by R.B. Minkoff v. Paley, et al. (Civ. Action No. 86/229).* The complaint alleged, *inter alia*, that "Tisch has been able to acquire 'creeping control' of CBS by purchasing shares on the New York Stock Exchange and otherwise without paying the premium for such control that is warranted, all of which is to the detriment of CBS and its stockholders."[3]

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[3] Complaint, paragraph 18 (c) (iv). The *Minkoff* case has been transferred to the Southern District of New York.

The chorus of concern over the *de facto* transfer of control question stemmed from a fractious meeting of the CBS board on September 10, 1986.[4] On that date, Mr. Thomas A. Wyman, then chairman of the board, president and CEO, urged consideration of an overture from Coca-Cola to purchase CBS. Mr. Tisch opposed the Wyman proposal. The board then discussed whether CBS should remain independent or be offered for sale. A consensus emerged in favor of independence, at least temporarily. Board members sought specific assurances from Tisch that Loews would not seek to dictate or direct the actions of CBS' board. Tisch responded that CBS should continue to operate as an independent company.

Board members inquired whether Loews intended to seek control of CBS. Tisch denied such a present intention, but subsequently made clear that he did not disavow such a future intention. In the absence of Paley and Tisch, the board members agreed to name Tisch CEO during a transition period in which a permanent successor to Wyman would be sought. The transition period was envisioned as a "few months," but Tisch became president and permanent CEO on January 14, 1987. 2 F.C.C. Rcd. at 2275 n. 1 (p. 14a, infra). According to Mr. Wyman, the CBS search committee to replace Mr. Tisch never met.[5]

The Commission responded to FIM's request on September 17, 1986, by sending a terse, unprobing letter to CBS noting:

> On September 12, 1986, this agency received a complaint, a copy of which is enclosed, from a group called Fairness in Media, which alleged that an unauthorized transfer of CBS, Inc., had occurred by virtue of the acquisition of nearly 25 percent of CBS stock by Loews, Inc. In addition, there has, of course, been widespread media coverage of the various recent changes in the management of CBS, Inc.

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[4] The narrative is based on the Minutes of the board of directors meeting supplied by CBS.

[5] See N.Y. Post, Jan. 22, 1988.

> The purpose of this letter is to afford CBS, Inc., an opportunity to address, in detail, the allegation that there has been a transfer of control.

At no time did the Commission request FIM to submit affidavits or sworn oral testimony to bolster the transfer of control allegations sent to CBS by the Commission.

CBS responded to the Commission's letter on October 1, 1986. Prior to the response, astute legal counsel would have informed CBS directors that confessing a *de facto* transfer of control would require divestiture of four CBS radio stations and either its New York or Philadelphia television station under the Commission's multiple ownership restrictions.[6] A confession also would expose many board members to damages in the pending stockholders' derivative suit, and could lead to revocations of CBS broadcast licenses or denials of license renewals. See e.g., *Stereo Broadcasters Inc.*, 87 F.C.C. 2d 87 (1981).

It was unsuprising, therefore, that acting chairman of the CBS board, Mr. William Paley, authored a letter to the Commission earnestly denying any transfer of control.

Prior to the October 1, 1986 submission by CBS, three of its officers, including Newton Minnow, and former F.C.C. Chairman and CBS lawyer, Richard Wiley, lobbied *ex parte* with the full F.C.C. against an investigation of the *de facto* transfer of control question. As reported in *The Wall Street Journal* of September 25, 1986, CBS insisted that Tisch had not acquired control, and a CBS lawyer, Lawrence Secrest, boasted that "Given the circumstances, it would be astounding if the Commission found anything other than that there was no transfer of control."

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[6] See p. 4, n. 2, supra.

On October 20, 1986, the Commission lettered Mr. Paley its conclusion that no *de facto* transfer of control of CBS had occurred. *Letter to William S. Paley*, 1 F.C.C. Rcd 1025 (p. 6a, infra). Prior to that finding, the Commission declined to question or cross-examine any present or former CBS director, official or employee regarding the control issue, including Wyman or Tisch. It declined to ask any corporate law expert or broadcast maven whether 25 percent ownership of CBS stock empowered Tisch to control the election of the board of directors. They are elected annually by plurality vote.[7] It declined to address the financial conflicts of interest by persons preparing the CBS response, including Paley and Minnow. The outstanding *Minkoff* suit alleges they wrongly permitted Tisch to acquire control of CBS without paying a "control premium." Moreover, five CBS broadcast divestitures would be required if a *de facto* transfer of control is found.

The Commission rejected the view that a *de facto* transfer of control to Tisch had occurred because he was the dominant minority shareholder of CBS owning approximately 25 percent of its shares. The Commission insisted that legal control of CBS remained in stockholders owning the other 75 percent of the company. Additionally, the Commission believed no clear evidence showed Tisch dominated other CBS board members or management of the company. Accordingly, the Commission declared no further investigation was warranted beyond the self-serving response of CBS. 1 F.C.C. Rcd at 1026-1027 (p. 9a, infra).

FIM petitioned the Commission for reconsideration. It sought to stimulate the Commission's investigatory appetite regarding the *de facto* control issue by appending additional information. It fortified the allegations that Tisch was charting CBS policy, revamping CBS operations, appeared in control to unbiased outsiders, and possessed the power to win a proxy fight against any disagreeable board member seeking re-election.

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[7] See CBS, Inc. By-Laws, Article II, Section 1.

The Commission denied FIM's petition for reconsideration. 2 F.C.C. Rcd 2274 (1987) (p. 14a, infra).

FIM petitioned the Court of Appeals to review the Commission's allegedly arbitrary and capricious investigatory slumber. After oral argument, the Court in a per curiam unpublished opinion denied the petition on June 8, 1988. It announced that:

> "The facts before the Commission justified the determination that no transfer triggering a need for immediate investigation had occurred. Were agencies forced to prolong inquiries and to spend large resources whenever confronted with allegations, speculation or prediction of the kind petitioner presses, the expeditious scheduling of agency agendas and efficient execution of agency business would be severely impeded."

REASON FOR GRANTING THE WRIT

The Court of Appeals flouted the unambiguous teachings of this Court in *Dunlap v. Bachowski*, 421 U.S. 560 (1975), and *Heckler v. Chaney*, 470 U.S. 821 (1985) applicable to reviewing investigative inaction by administrative agencies.

The three major television networks in the United States– ABC, NBC, and CBS– exercise pivotal influence over public opinion and the functioning of the electoral process. It is thus exceptionally important that any transfer of control of a network be previously scrutinized by the Federal Communications Commission under 47 U.S.C. 310(d) to insure that controlling persons satisfy public interest standards.

Recently, when ABC was acquired by Cap Cities and NBC was sold to General Electric, the acquiring companies received prior scrutiny and approval by the Commission. But the decision of the Court of Appeals in this case wrongly and unfairly sanctions circumvention of section 310(d) by CBS by flouting standards for reviewing investigative inaction expounded in *Dunlap v. Backowski*, 421 U.S. 560 (1975), and *Heckler v. Chaney*, 470 U.S. 821 (1985).

In the former case, this Court concluded that the arbitrary or capricious standard set forth in 5 U.S. Code 706 (2)(A) should govern judicial review of non-enforcement decisions of the Secretary of Labor regarding union election law violations. That standard is to be applied to the statement of reasons elucidated by the Secretary for his declination to initiate suit. In applying the standard, a reviewing court must consider whether the withholding of law enforcement action was based on a consideration of relevant investigatory or enforcement factors, or whether there was a clear error in judgment. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1972).

The *Heckler* ruling did not disturb these teachings. It held that there is an interpretive presumption against judicial review of investigative or enforcement inaction under the Administrative Procedure Act. But where, as here, that presumption is overcome by the mandatory language and purpose of section 310(d), a view tacitly accepted by the Court of Appeals, then the *Dunlap* precedent governs the legal analysis.

On the merits, the Court of Appeals blatantly misapplied the arbitrary or capricious standard of review. It blessed the Commission's inaction for spurious reasons not advanced by the agency itself. The Court insisted that the Commission's enforcement resources would be dissipated and the efficient execution of its business severely impeded if it were required to pursue FIM's allegations and evidence affirming Mr. Tisch's control of CBS.

But the F.C.C. never claimed such prospective harm to its operations. That is because to require the F.C.C. to investigate further in this case involving a broadcast giant would not suggest the Commission should pursue transfer of control allegations regarding less powerful broadcasters with equal thoroughness.

Further, the Commission's entire investigation consisted of a single, terse letter to CBS coupled with a self-serving response.

To require a modicum of additional investigative exertion to avoid an arbitrary or capricious emblem will not exhaust the Commission's enforcement resources. The F.C.C. has never declared it would.

The Commission's investigative lassitude in this case was manifestly arbitrary based on the evidence before it. Mr. Tisch is chief executive officer, president, a member of the board of directors, and the largest stockholder of CBS owning a 24.9 percent share.

A 24.9 percent stockholder is ordinarily endowed with power to control *de facto* a widely held corporation such as CBS in which the second largest stock owner, Mr. Paley, owns but an 8 percent share. See *Essex Universal Corp. v. Yates*, 305 F.2d 572, 579 (2d Cir. 1962) ("28.3 percent of the voting stock of a publicly owned corporation is usually tantamount to majority control...").

Mr. Tisch, as a board member, CEO, and president of CBS, exercises a dominant voice in its policy decisions.

Mr. Tisch has dismissed the president of the publishing division of CBS and its 14-member corporate staff. He likewise ousted Van Gorden Sauter as president of CBS news. Power to set personnel policy and take personnel actions, the Commission has declared, is an exceptionally important earmark of control. *Stereo Broadcasters, Inc.*, 87 F.C.C.2d 87, 93 (1981).

With regard to finances and corporate direction, Tisch has sold CBS' textbook publishing division for $500 million, its music publishing division for $125 million, its records group to Sony for $2 billion, and CBS magazines to a management group for $650 million. The latter two mammoth sales, as the F.C.C. must recognize, 2 F.C.C. Rcd at 2275 n. 7, overturned earlier opposition by the CBS board to such actions. Indeed, after the $2 billion Sony sale, a CBS director was quoted in the November 20, 1987 *The Wall Street Journal* as lamenting: "When

you've got (Tisch and Paley) sitting there at the table with one-third of the shares who want to do (a deal), how do you fight it? The deck is well-stacked here."

Tisch's sales of CBS' records and magazine groups cut CBS' profits by approximately 48 percent and CBS' revenues by approximately 40 percent based on its 1986 Annual Report. The Commission has identified authority over corporate policy and finances as key earmarks of *de facto* control. See *Stereo Broadcasting, Inc.*, supra.

Thomas Wyman, former chairman, CEO and president of CBS characterized Tisch's asset sales as an "instant dismemberment" of CBS in a recent lecture at the Yale School of Organization and Management.[8] A stock analyst has stated that Tisch "redesigned CBS overnight. With the sale of the record division, Tisch has undone two decades of expansion." [9]

Mr. Wyman negotiated a "Golden Parachute" arrangement with CBS triggered when any entity acquired 25 percent of CBS' common stock. That arrangement strongly suggested Mr. Wyman believed that amount of stock ownership enabled an entity to control CBS or to dictate personnel.[10] After Wyman's discharge, he negotiated an exceptionally lucrative severance agreement with CBS, albeit not expressly a "Golden Parachute."

The *Minkoff* suit alleges Tisch has acquired *de facto* control of CBS, Inc. with his 24.9 percent share of its common stock without paying a control premium.

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[8] See New York Post, 1/22/88.

[9] See Forbes, 1/11/88.

[10] See 1986 Proxy Statement of CBS.

During the Yale School of Organization and Management lecture, Mr. Wyman asserted that Tisch disingenously denied intending to control CBS through his 25 percent stock ownership to avoid paying a control premium of perhaps $50 per share; and, that the search committee selected to find a replacement for Tisch as CEO never met.

Despite this information, the Commission closed down its investigation of the transfer of control issue after receipt of a self-serving statement from CBS, an entity with glaring conflicts of financial interest in the matter. The F.C.C. conducted no inquiry to substantiate the accuracy of CBS's response. It undertook no analysis of whether Tisch's 24.9 percent stock share as a practical matter endowed him with *de facto* control of CBS.

In sum, the Commission's investigation was a sham that demands judicial denunciation as arbitrary under the precedents of this Court. The Court of Appeals flagrantly erred in holding otherwise.

CONCLUSION

For the reasons previously amplified, this petition for certiorari should be granted to prevent agencies from *de facto* nullifying laws through investigative inaction in defiance of precedents proclaimed by this Court.

Respectfully submitted,
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September 6, 1988

APPENDIX

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 87-1217

Fairness in Media,
Petitioner

v.

Federal Communications Commission

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BEFORE: ROBINSON, RUTH B. GINSBURG, AND SENTELLE, Circuit Judges

JUDGMENT

This petition for review was considered on the record from the Federal Communications Commission and was briefed and argued by counsel. The court, upon full consideration of the case, has determined that its disposition does not warrant a published opinion. *See* D.C. Cir. R. 14(c).

Assuming, but not deciding, that petitioner is positioned to invoke court review, we are satisfied that the Commission dealt reasonably and appropriately with the merits of the complaint. The facts before the Commission justified the determination that no transfer triggering a need for immediate investigation had occurred. Were agencies forced to prolong inquiries and to spend large resources whenever confronted with allegations, speculation or prediction of the kind petitioner presses, the expeditious scheduling of agency agendas and efficient execution of agency business would be severely impeded. Accordingly, it is

ORDERED and ADJUDGED that the petition for review be denied. It is

FURTHER ORDERED, by the Court, on its own motion, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. R. 15. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

Before the
Federal Communications Commission
Washington, D.C. 20554

October 16, 1986

BY DIRECTION LETTER

Mr. William S. Paley
CBS Inc.
51 West 52nd Street
New York, NY 10019

Released: October 20, 1986**

Dear Mr. Paley:

This is in reference to a "Petition and Complaint" filed by Fairness In Media ("FIM") on September 12, 1986, FIM's Addendum to that Petition and your comments on the matters raised by FIM which were filed October 1, 1986. In its filing, Fairness In Media requested the Commission to investigate whether an unauthorized *de facto* transfer of control of CBS Inc. ("CBS") to Loews Corp. ("Loews") and its Chairman, Laurence A. Tisch had taken place. Further, it urged that the Commission find that such a transfer of control had taken place and require CBS, Loews, and Tisch to comply with Section 310(d) of the Communications Act of 1934, as amended, by filing the requisite application for Commission approval of the alleged transfer of control.

In support of its request, FIM asserted that, in July 1985, Loews purchased 5% of CBS's common stock and that, pursuant to an agreement reached between the CBS Board of Directors and Loews in October 1985, Loews purchased additional stock to the extent that by, August 1986, its ownership interest in CBS reached nearly 25%. Furthermore, it pointed to statements by Preston Robert Tisch, (President of Loews Corp.), present and former CBS officers and directors, and others to

the effect that Laurence Tisch intends to assert control over the corporation. Copies of articles that have appeared in various publications concerning these events were attached to the FIM filing.

On September 30, 1986, FIM filed an "Addendum to Petition and Complaint" asserting that subsequent to its original finding Laurence Tisch had become the Chief Executive Officer of CBS and had exercised control over CBS by, for instance, orchestrating the removal of the existing Chairman of CBS and making himself its chief executive. Furthermore, it asserted that Mr. Tisch had in fact, been exercising significant control over CBS since December 1985. In support of this allegation FIM argued that cost control measures implemented by CBS in December 1985, were "similar to those implemented by CNA Financial Corporation during the course of its takeover by Loews." FIM again requested that the Commission investigate the situation and require CBS Inc., Loews Corp., and Laurence Tisch to comply with Section 310(d) of the Communications Act. Additionally, the Addendum asked that the Commission impose sanctions in the event it determined that an unauthorized transfer of control had taken place.

Subsequent to FIM's original filing, the Chief, Mass Media Bureau, sent a letter to CBS notifying it of the Commission's receipt of the Petition and Complaint and taking note of the press coverage of the management changes at CBS. The letter afforded CBS an opportunity to respond. On October 1, 1986, CBS filed its comments signed by you denying that an unauthorized transfer of control over CBS had taken place and a memorandum of law in support of these comments. Generally, CBS asserted that management authority over the corporation is exercised by its Board of Directors acting on behalf of the corporation's shareholders. Among the Board's management responsibilities is the oversight of management. In this regard, you stated that on September 10, 1986, the CBS Board, consisting

primarily of outside directors, met and that its outside directors together with a single inside director (Walter Cronkite), decided to replace the Chief Executive Officer. This change resulted in the departure of the existing C.E.O. and the election of Laurence Tisch to the position. According to your response, the outside directors and Mr. Cronkite voted to appoint Mr. Tisch as acting CEO on a temporary basis until a new CEO is selected. The Board also appointed a "management committee" chaired by Mr. Tisch and "consisting of a majority of outside directors" to which Mr. Tisch would report between Board meetings. This, you asserted, will "further fortify the Board's authority over the operations of the corporation." The Board also named you as Acting Chairman. CBS contended that no transfer of control over the corporation had occurred and that neither you nor the other Board members "intended to surrender control of CBS to Mr. Tisch, nor did he intend to assume such control." Finally, you assert that there exists no agreement between Mr. Tisch and you (who together control approximately 33% of the shareholders' votes) with respect to the voting of stockholdings or the positions that you two will take on matters to come before the Board.

The Communications Act contains no definition of "control" for the purposes of Section 310(d) and the Commission has recognized that "there is no precise formula by which control may be ascertained." (footnote omitted.) *In re: Tender Offers and Proxy Contests*. 51 Fed. Reg. 9794,. (March 21, 1986), 59 RR 2d 1536, 1542. As recent Commission decisions and policy statements have recognized, the locus of control in a publicly-held corporation can be difficult to place given the varying and diffuse degrees of working control typically exercised at different levels of such corporations. Id. at 1543. While a change in ownership is an important factor in determining whether control has been transferred it is not necessarily determinative. Id. at 1542. Nor does the Commission consider changes in a board of directors over a period of time to generally constitute a transfer

of control. Id. at fn. 40. Rather, the determination as to issues of control, "... is a complex task which must be done on a case-by-case basis." *Storer Communications Inc. v. F.C.C.*, 763 F.2d 436, 442 (D.C. Cir. 1985).

In the instant matter, application of our prior decisions concerning *de facto* transfers of control to the facts presented compels our determination that, as of the present time, no *de facto* transfer of control over CBS Inc. has occurred. Here we are not dealing with an assertion that *de jure* control over CBS Inc. has shifted. Instead, allegations have been raised that *de facto* control over the corporation has been transferred to Loews and, by extension, to Mr. Tisch. By definition, *de facto* control relies on facts, on events that have occurred. Unlike a *de jure* transfer of control, where the mere potential to exercise majority vote requires prior Commission consent and in which an abstention from any activity evidencing control or influence does not excuse noncompliance, a finding that a *de facto* transfer of control has occurred depends largely upon a review of the actual operation of the licensee – not upon the potential for some hypothetical future exercise of control. *See News International, PLC*, 97 FCC 2d 349 (1984). Other than cases in which conduct demonstrates that control has actually been exercised, the Commission will find a *de facto* transfer of control to a minority shareholder only where there is clearer evidence of that minority shareholder/director's dominance. As an example of the latter, in *George E. Cameron, Jr.*, 91 FCC 2d 870 (Rev. Bd. 1982), *recon. denied*. 93 FCC 2d 789 (1983), *applications for review dismissed as moot*, FCC 84-367 (August 1, 1984), the Review Board found that a 49% shareholder, director and officer possessed *de facto* control of the licensee corporation because he: a) had a 49% interest in the licensee's parent company with an option to increase his interest to nearly 100%; b) was the managing partner of the licensee's parent company and president of the subsidiary/licensee; and, perhaps most importantly, c) held judgments against other principals which, if exercised, "would financially

cripple them." *Id.* at 889-890. Additionally, this individual's "long-time subaltern" had been made the station's general manager. This "total dominance" was found to constitute *de facto* control. Similarly, in *Western Gateway Broadcasting Corp.*, 16 FCC 274 (1951), a minority shareholder's demonstrated ability to control both his own and his relatives' shares - relatives who were characterized as completely subservient and "for all practical purposes...his pawns or dummies..." - resulted in a finding that the subject minority shareholder had acquired *de facto* control of the licensee without the Commission's consent.

In the instant matter, the Commission is unable to conclude that a *de facto* transfer of control has occurred or that the matters raised by FIM warrant further investigation. Loews is a minority CBS shareholder. More than 75% of the voting power and ownership of CBS remain with the general shareholders who "retain ultimate and legal control" of the corporation. *See Committee for Full Value of Storer Communications, Inc.*, 101 FCC 2d 434, 445, *aff'd sub nom. Storer Communications, Inc. v. F.C.C., supra; cf. Turner Broadcasting System, Inc.*, 101 FCC 2d 322, (1985). Nor is there, at present, any evidence before the Commission that would suggest that Mr. Tisch, himself a minority shareholder, has the sort of influence with the remaining shareholders that the Commission in the past has found to constitute *de facto* control. *See George E. Cameron, Jr., supra; see also Western Gateway Broadcasting Corp., supra.*

This case is therefore unlike *Metromedia, Inc.*, 98 F.C.C. 2d 300 (1984), *recon. denied.*, 56 Radio Reg. 2d (P&F) 1198 (1985), *appeal dismissed*, California Ass'n of the Physically Handicapped v. FCC, 778 F.2d 823 (D.C. Cir. 1985), in which there was no dispute that John Kluge, who owned 26% of the stock of Metromedia and was the President, Director, Chairman of the Board, Chief Executive Officer and largest stockholder, held *de facto* control of the corporation. For 25 years, Mr. Kluge had had the power to determine who would serve on

Metromedia's Board of Directors. He had nominated a majority of the then current members of the Board and no Board members were nominees of anyone else. Mr. Kluge also controlled Metromedia's management proxy process. In every year since 1959, Mr. Kluge had been designated proxy in management's annual proxy solicitations. Mr. Kluge had had the power to control the voting of virtually all of the Company's stock at every annual meeting during this period. And in Form 10–K Reports and Proxy Statements filed with the Securities and Exchange Commission, Mr. Kluge had been identified as the controlling party of *Metromedia*, See 98 F.C.C.2d at 303–306.

Nor could we conclude a *de facto* transfer of control occurred were we to accept the position urged upon the Commission in CBS's comments filed in Tender Offers and Proxy Contests, *supra*. There, CBS maintained that the Commission's decision in Storer should be limited to its facts because "where stockholders are widely dispersed among numerous individual shareholders and passive institutional investors, actual operational authority – the *de facto* control with which the Communications Act is concerned – frequently rests with the Board." CBS Comments in MM Docket No. 85–218 at 46. Assuming, arguendo, that the locus of control of CBS is in its Board of Directors, there is no evidence that the events described in the pleadings constituted a transfer of control for the purposes of Section 310(d). In the instant case it is undisputed that the CBS Board, excluding Messrs. Tisch and Paley, voted to disapprove a proposal by the corporation's then Chief Executive Officer to respond positively to any interest evidenced by the Coca–Cola Company in the purchase of CBS; voted to accept the then CEO's resignation; and, elected Mr. Tisch acting CEO and Mr. Paley acting Chairman of the Board until a new CEO, President and Chairman for CBS were found. Moreover, the Board appointed a Management Committee to "review the Corporation's operations during such transition period and to advise the acting Chief Executive Officer with respect thereto..." While Mr.

Tisch clearly plays an important role in the operations of CBS, the Commission possesses no evidence that Mr. Tisch alone or in privity with other Directors under his domination, has obtained ultimate control of CBS. Nor does his appointment by the Board to act as Chief Executive Officer constitute the kind of conduct that by itself demonstrates *de facto* control. The mere fact that Mr. Tisch's accession may affect working control of CBS does not mean that this event constitutes a transfer of control. See Tender Offers and Proxy Contests, *supra* at 1543. As the Court of Appeals has stated:

> Corporate officers or station managers may exercise substantial day-to-day working control; yet FCC approval would not be required before a corporation was allowed to replace such personnel. Directors may also change on an evolutionary basis, e.g., several directors may retire or resign over the course of a year. The Commission only requires that such evolutionary changes be reported on an annual Ownership Report.
>
> *Storer Communications, Inc.*, v. F.C.C., *supra* at 442.

We are confronted with no evidence that any event transpired in the instant situation beyond those described above. A corporate Board, dissatisfied with the performance of an incumbent CEO, replaced him with another individual. That individual's actions were made subject to review by a Management Committee of the Board – (composed of the individual and four other Board members whose terms predated that of the new CEO); to approval or disapproval by the Board that appointed him; and, ultimately, to review by the company's shareholders. Most critically, the actions that have taken place have occurred in the context of a corporation that has an active and independent Board of Directors that has been and remains openly antagonistic to CBS coming under the domination of any outside party. We conclude that the events, to date, do not constitute a transfer of control within the meaning of Section 310(d) of the Communications Act of 1934, as amended.

BY DIRECTION OF THE COMMISSION*

William J. Tricarico
Secretary

*Commissioner Dennis not participating

**Note: Note: This item, although publicly released on the date indicated, was not included in the appropriate volume of the Federal Communications Commission Record.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re By Direction Letter

Regarding Control of CBS Inc.

MEMORANDUM OPINION AND ORDER

Adopted: March 20, 1987; Released: March 20, 1987*

1. On October 20, 1986, the Commission, upon consideration of allegations raised by Fairness in Media (FIM) that *de facto* control of CBS Inc. (licensee of several radio and television stations), had been transferred to Loews Corp., owner of 24.9% of CBS stock, or to Loews' Chairman, Laurence A. Tisch, without prior Commission authorization, concluded that the evidence did not support a finding of a transfer in violation of Section 310(d) of the Communications Act of 1934, as amended. *Letter to William S. Paley*, 1 FCC Rcd. 1025. 61 RR 2d 413 (1986).

2. We now have before us: (1) a Petition for Reconsideration of this matter, filed by FIM on November 14, 1986; (2) a response filed by CBS on November 24, 1986 ("Opposition of CBS Inc. to Petition for Reconsideration"); and (3) further comments by FIM ("Reply to Opposition to Petition for Reconsideration") filed December 9, 1986.[1]

3. FIM repeats many of the arguments and events cited in its initial complaint. In addition, FIM makes certain new claims in support of its contention that the Commission should reverse its original finding or, alternatively, investigate further whether a *de facto* transfer of control has taken place:

> (a) A minority owner such as Loews, with its 24.9% interest in CBS, has a "high probability" of defeating "any

Board member in a proxy fight over re-election if a dispute arose over CBS policy", and thus "elicit[s] obedience" from other Board members wishing to remain on the Board.

(b) A minority owner of such proportion, mounting a publicity campaign which would be prohibitively expensive to oppose, may directly control a corporation's policy decisions by combining its votes with those proxies it can attract from widely scattered small shareholders.

(c) Twenty-five percent ownership of a widely held corporation is generally "sufficient to gain control," as evidenced by the 25% de jure standard employed by the Federal Bank Holding Company Act, 12 U.S.C. 1841, and by the 28.3% standard adopted by one judge of a three-judge panel interpreting New York corporation law incidental to analyzing a contract dispute in *Essex Universal Corp. v. Yates*, 305 F.2d 572, 579 (2d Cir. 1962).

4. The Commission has historically rejected a formulistic approach based on a particular level of minority holdings in its *de facto* control analyses.[2] FIM has not demonstrated here why such an approach should now be adopted. In addition, the Commission has recently made it clear that conjecture about the outcome of possible proxy battles is not a basis for determining control.[3] Furthermore, whatever the relevance of the statute and cases FIM cites, Loews' ownership of just less than the 25% benchmark does not in any event reach the levels established therein.[4]

5. To bolster its claims regarding the control wielded by Loews as a 24.9% stockholder of CBS, FIM makes several additional observations:

(a) The CBS Board minutes of September 10, 1986,[5] and the fact that no successor CEO has yet been selected,[6] show that "CBS' Board perceive[s] Tisch as the dominant force in the management hierarchy and as capable of asserting his will whenever he chooses."

(b) "Tisch has reshaped CBS management in his own image," as evidenced by the "revolutionary changes initiated

by Mr. Tisch since he became CEO. Changes of this nature are unlikely to have been unanimously approved by the other Board members and therefore must have been initiated by Mr. Tisch acting unilaterally.

(c) As to the Commission's finding that the CBS Board members continue to be active and independent, "there is no evidence that the CBS Board ever acted contrary to the wishes of Mr. Tisch," or that "Mr. Tisch as CEO ever sought the advice of CBS Board Members or altered a single managerial or policy decision because of the views of a Board member." In addition, the Tisch family's history in relation to Loews Corp. shows that "Tisch knows how to wield minority stock ownership to assert corporate control."

6. We carefully examined the September 10 Board minutes before issuing our October 20, 1986 ruling. At that time we saw nothing of decisional significance in the passage FIM highlights and find no reason to alter that conclusion. Moreover, Mr. Tisch's appointment as president and chief executive officer after holding the post for four months in a temporary capacity does not raise a suspicion that Board members have in any way relinquished their independent judgment. Considering CBS' denial and the cases cited in its Opposition, we reject the idea that the changes initiated by Mr. Tisch were outside the scope of this authority as CEO or were made in opposition to the Board's wishes. FIM's characterization of the CBS Directors as powerless to do anything but retain their positions on the Board is not supported by the evidence.[7]

7. Based on our review of the entire record in this case, we find that further Commission action is unwarranted at this time. Neither the initial papers before us nor the Petition for Reconsideration contain evidence of specific exercises of control by Mr. Tisch, and therefore by Loews Corp., or evidence that the Board of CBS no longer has the ability to act independently, or that the other shareholders have relinquished their franchises to Mr. Tisch, sufficient to demonstrate that a transfer, within the meaning of the statute, has taken place. Furthermore, the Peti-

tion for Reconsideration reveals no error of law that would persuade us to deviate from our conclusion in the first instance.

8. Accordingly, for the reasons stated above, IT IS ORDERED, that FIM's Petition for Reconsideration IS DENIED.[8]

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico Secretary

*Note: This item, although publicly released on the date indicated, was not included in the appropriate pamphlet of the Federal Communications Commission Record.

FOOTNOTES

1 In addition, we take notice of the January 14, 1987, action by the CBS Board appointing Laurence Tisch as president and chief executive officer and appointing William Paley as Chairman.

2 *News International, PLC*, 97 FCC 2d 349, 355 (1984); *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981); WHDH, Inc., 17 FCC 2d 856, 863 (1964), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 903 (1971).

3 See, generally, *Tender Offers and Proxy Contests*, 59 RR 2d 1536, 1583 (1986) (considering transfer of control issues in declining to adopt generic procedures applicable in all situations involving proxy contests). "[W]e believe there are many situations in which the use of proxies to elect members of the Board would not constitute a change in control," *id.* at 1544; and "we do not expect that the use of a proxy mechanism solely in conjunction with matters other than the election of directors would raise transfer of control issues." *id.* at 1544, n. 39.

4 We also note that while the Bank Holding Company Act contains a "bright line" of 25% ownership (12 U.S.C.

184(a)(2)(A)) for determining control, it provides for case-by-case analysis in other situations (12 U.S.C. 1841(a)(2)(C)). FIM's reliance on it is curious as Loews does not quite meet the "bright line" level of 25% ownership in CBS and, accordingly, even the Bank Holding Company Act would apparently require the type of analysis performed by the Commission in this matter.

5 These minutes reflect that Board members sought and received Mr. Tisch's assurance that Loews would not seek changes that might make CBS a Loews subsidiary or attempt to dictate or direct the actions of CBS' Board.

6 See note 1, *supra*.

7 For whatever value they may be, the news clippings submitted with FIM's filings to bolster its allegations are selective, citing only alleged instances of Mr. Tisch's control while omitting other news reports detailing instances in which the Board apparently rejected the advice of Mr. Tisch. See, e.g., *Newsweek*, Nov. 24, 1986, at 7, col. 4 (Tisch proposal to sell the CBS Record Group for in excess of $1 billion rejected by Board); see also N.Y.Times, Nov. 20, 1986, at D5, col. 6 (report of Mr. Tisch's apparent shift to the CBS Board's position rejecting a $600 million offer for CBS' magazine business).

8 FIM also requested oral argument on its Petition for Reconsideration. We do not find that oral argument will significantly contribute to our understanding of the matters raised in the Petition. Accordingly, we will deny that request.

Supreme Court, U.S.
FILED
OCT 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-388

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

FAIRNESS IN MEDIA,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA and CBS INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the District of Columbia Circuit was correct in affirming the Federal Communications Commission's decision not to conduct further investigation into an alleged transfer of control of CBS Inc. in circumstances where: (a) the decision at issue is committed by law to agency discretion and is thus unreviewable; and (b) the agency in fact conducted an investigation, compiled a detailed record, and reached a conclusion on the merits that was fully in accord with established precedent.

RULE 28.1 LIST

CBS Inc. has the following parent companies, subsidiaries* and affiliates to list pursuant to Rule 28.1:

Alexandra Film Productions, Inc.
Aspenfair Music, Inc.
Bala Cynwyd Associates [General Partnership]
Beverlyfax Music, Inc.
CBS Broadcast International of Canada Limited
CBS Broadcast Services Ltd.
    CBS Pension Trustees U.K. Limited
CBS FMX Stereo Inc.
CBS/FOX Company, The [General Partnership]
    CBS/FOX VIDEO (Holdings) Ltd.
        CBS/FOX VIDEO Limited
    CBS/FOX VIDEO (Germany) G.m.b.H.
    CBS/FOX VIDEO (South Pacific) Pty Ltd.
    CBS/FOX VIDEO (Canada) Ltd.
    CBS/FOX VIDEO (Espanola) S.A.
    CBS/FOX VIDEO French Film Licensing Corp.
        CBS/FOX VIDEO (France) S.A.
    CBS/FOX VIDEO International S.A.R.L.
    CBS/FOX VIDEO (New Zealand) Limited**
    CBS/FOX VIDEO (Far East) K.K.
CBS Gramophone Records & Tapes (India) Ltd.***
CBS/MTM Company [General Partnership]
CBS Urban Renewal Corporation
CJG Productions Inc.
Columbia Television, Inc.
Katy Film Productions, Inc.
Meadowlands Parkway Associates [General Partnership]

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* Inactive subsidiaries are not included in this listing.

** An additional .01 percent of voting shares is owned by CBS/FOX VIDEO (South Pacific) Pty. Ltd.

*** Subject to agreement of sale dated November 19, 1987 with Sony Corporation; awaiting deferred closing.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-388

FAIRNESS IN MEDIA,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA and CBS INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent CBS Inc. respectfully requests that this Court deny the petition for writ of certiorari seeking review of the District of Columbia Circuit's opinion in this case (*Fairness in Media v. FCC*, No. 87-1217 (D.C. Cir. June 8, 1988) (per curiam)). That opinion is not published, but is reproduced in the appendix to the petition at 1a.

During the course of 1985, there was intense public speculation about the prospect of a change in control at CBS Inc. In January of that year, Fairness in Media ("FIM"), a group led by U.S. Senator Jesse Helms, urged others to purchase CBS stock in an effort to force a change in the editorial content of CBS News broadcasts.

Arbitrageur Ivan Boesky subsequently acquired a substantial amount of CBS stock, leading to public conjecture that CBS might be sold or that control of the corporation might otherwise be transferred. Finally, in April of 1985, Turner Broadcasting System, Inc. initiated an effort to acquire CBS through a leveraged exchange offer. In each of these instances, the CBS Board of Directors concluded that the interests of the shareholders would best be served by maintaining the corporation's independence, and strenuously opposed the effort to undermine that objective.

Following a July 3, 1985 announcement that CBS would institute an exchange offer for a portion of its own shares, Loews Corporation purchased approximately 9.9 percent of CBS's common stock. The CBS exchange offer was consummated on August 1, 1985. Soon thereafter, Turner Broadcasting announced the withdrawal of its effort to acquire the corporation.

In October of 1985, the Chairman of Loews, Mr. Laurence Tisch, advised the Chairman and Chief Executive Officer of CBS, Mr. Thomas Wyman, that Loews intended to purchase up to 25 percent of the corporation's common stock. Mr. Tisch stated that the purchases would be for investment purposes.[1] Subsequently, the CBS Board determined that the proposed increase in Loews's stock holdings would be consistent with the continued independence of CBS and the interests of the other CBS shareholders. On October 16, 1985, Mr. Tisch was invited to join the CBS Board.[2]

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[1] This statement is in accord with representations made by Loews in its filings with the Securities and Exchange Commission.

[2] Prior to Mr. Wyman's resignation from the CBS Board, the Board consisted of three "inside" directors who were current or former employees of CBS and 11 "outside" directors. The "inside" directors were Mr. Wyman; William S. Paley, the Founder Chairman of CBS, who established the company and served as Chairman of the CBS Board from 1928 to 1983; and Walter Cronkite, the former anchor of the CBS Evening News and currently a Special

At a regularly scheduled meeting of the CBS Board on September 10, 1986, the directors were informed by Mr. Wyman that he had received an overture from The Coca-Cola Company which could lead to discussions contemplating the purchase of CBS by Coca-Cola. Mr. Wyman recommended that the Board authorize him to furnish certain confidential corporate information to Coca-Cola and appoint a committee of outside directors to review and analyze any offer that might be forthcoming. Mr. Wyman's proposal once again raised the question whether CBS should remain an independent company. Mr. Paley and Mr. Tisch each responded to Mr. Wyman's proposal by expressing the view that CBS should not be offered for sale to anyone at that time and by stating that their respective holdings of CBS stock were not for sale.[3] Mr. Wyman then withdrew from the meeting.

In the ensuing discussion, the consensus of the remaining directors was that CBS should continue to be operated as an independent company. There followed a discussion of perceived shortcomings in Mr. Wyman's management of CBS. At the conclusion of this discussion, Mr. Cronkite and Mrs. Marietta Tree, one of the outside directors, stated that they believed that Mr. Wyman should resign for the good of the corporation and its shareholders.

Mr. Paley then proposed that Mr. Wyman be permitted to resign, that Mr. Paley be named acting Chairman of

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Correspondent to CBS News. With the exception of Mr. Wyman, all of the directors who were in office when Mr. Tisch joined the Board continue to this date to serve on the Board. In addition, Mr. Preston Robert Tisch, the brother of Laurence Tisch, joined the Board in September 1988.

[3] In September 1986, Loews owned 24.9 percent of CBS's common stock which, because of outstanding voting preferred stock, represented approximately 23.6 percent of CBS's outstanding voting interests. Mr. Paley controlled 8.1 percent of the company's outstanding common stock.

the Board and that the Executive Committee of the Board (to consist of Mr. Paley, Mr. Tisch and several outside directors) exercise the powers of Chief Executive Officer during a transition period pending selection of a new Chief Executive Officer. At this point, pursuant to the request of the other directors, Messrs. Paley and Tisch withdrew from the meeting.

An extended discussion followed, after which the eleven remaining directors unanimously agreed that it would not be in the best interests of the shareholders to solicit proposals for a sale of the corporation at that time. The directors also concluded that, as a consequence of this decision, Mr. Wyman would resign. After considering Mr. Paley's management proposal, however, the directors who were present decided that CBS would be best served by the appointment of a single acting Chief Executive Officer to manage the corporation during the transition period and that, in view of his qualifications, Mr. Tisch should be asked if he were willing to serve as acting Chief Executive Officer.

Mr. Tisch then rejoined the meeting. After being informed of the tentative conclusions reached by the outside directors and Mr. Cronkite, he expressed his willingness to serve as acting Chief Executive Officer if that was the wish of the Board. Accordingly, after accepting Mr. Wyman's resignation, the Board appointed Mr. Paley as acting Chairman of the Board and Mr. Tisch as acting Chief Executive Officer.[4]

Shortly after this Board meeting, FIM filed pleadings with the Federal Communications Commission contending that *de facto* control of CBS had been transferred to Loews without the approval of the Commission in violation of 47 U.S.C. § 310(d) (1982), demanding a prompt investigation, and urging that "sanctions" be imposed

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[4] On January 14, 1987, the CBS Board appointed Messrs. Paley and Tisch to serve in these positions on a continuing basis.

on CBS. FIM's "factual" assertions were based solely on reports of developments at CBS that were contained in newspaper and magazine articles.

In a September 17, 1986 letter from the Chief of the Federal Communications Commission's Mass Media Bureau, the Commission asked CBS to provide a detailed response to the allegation that there had been a transfer of control of the corporation. The CBS reply, submitted on October 1, 1986, included:

- a certified copy of the minutes of the September 10, 1986 Board meeting;
- a letter from Mr. Paley setting forth an explication of the pertinent facts;
- an affidavit from CBS Board member (and former FCC Chairman) Newton Minow, containing a further description of the actions of the Board; and
- a memorandum setting forth the corporation's overall analysis of the facts and the law.

Taken together, these documents provided a detailed description of the facts and circumstances surrounding the management changes at CBS. In addition, the CBS submission reviewed relevant administrative and judicial precedents concerning *de facto* transfers of control and noted that the concept of "control" for the purposes of Section 310(d) has a meaning that is not in accord with the definition adopted by FIM. Specifically, CBS pointed to the Commission's long-standing view that "influence" within a corporate structure is not synonymous with the statutory concept of "control;" that corporations ordinarily do not need agency approval to replace their managers, officers or directors; and that a substantial minority shareholder will not be found to have acquired control unless that individual has acquired the ability to "dominate" or "dictate" the affairs of the corporation.

Mr. Paley, in his letter to the Commission, stressed the fact that no new entity had assumed the power to direct the affairs of CBS, stating that:

> the very essence of recent events was that the Board of Directors of CBS reaffirmed and reasserted its overall responsibility for the affairs of CBS, and, once again, restated the commitment to independence that has been the hallmark of this corporation since I founded it over fifty years ago.

Mr. Paley noted further that while he and Mr. Tisch had similar views concerning Mr. Wyman's performance in office, "Mr. Tisch and I have no agreement or understanding with respect to the voting of our stock-holdings or the positions we will take on future issues to come before the Board." Mr. Minow similarly stated in his affidavit that "each of the directors exercised his or her own independent judgment in determining what actions would be in the best interests of CBS's shareholders" and that "[n]either Loews Corporation nor Mr. Tisch has obtained the power or the authority . . . to dictate or direct the Board's actions."

In an October 20, 1986 letter to Mr. Paley, the FCC concluded that the management change at CBS "occurred in the context of a corporation that has an active and independent Board of Directors that has been and remains openly antagonistic to CBS coming under the domination of any outside party." *Letter to William S. Paley*, 1 F.C.C. Rcd 1025, 1027 (1986), *reprinted in* Appendix to Petition for Certiorari at 9a. Accordingly, the Commission agreed with CBS's assessment that no transfer of control had occurred within the meaning of 47 U.S.C. § 310(d).

FIM then sought reconsideration of the Commission's decision. By order dated March 20, 1987, the Commission denied FIM's petition for reconsideration. *CBS Inc.*, 2 F.C.C. Rcd 2274 (1987), *reprinted in* Appendix to Petition for Certiorari at 11a. In doing so, it reiterated

its long-standing policy of examining all relevant events and circumstances, rather than relying on "a formulistic approach based on a particular level of minority holdings," in determining questions of *de facto* control. *Id.* at 2274 (Appendix to Petition for Certiorari at 12a). The Commission stated that in examining the facts in this case, it had found no evidence that "the changes initiated by Mr. Tisch were outside the scope of his authority as CEO or were made in opposition to the Board's wishes." *Id.* at 2274 (Appendix to Petition for Certiorari at 13a). It also found no evidence that the Board of CBS had lost "the ability to act independently, or that the other shareholders [who continue to control over 75 percent of the voting stock] have relinquished their franchises to Mr. Tisch, sufficient to demonstrate that a transfer, within the meaning of [Section 310(d)], has taken place." *Id.* at 2274-75 (Appendix to Petition for Certiorari at 13a).

FIM sought review of the Commission's decision on May 18, 1987. The FCC and intervenor CBS urged the court to dismiss the FIM petition for the three independent reasons that: (1) it was not filed on a timely basis; (2) FIM failed to establish that it had standing; and (3) the FCC's decision represents an unreviewable exercise of the agency's enforcement discretion. On the merits, the agency and CBS argued that the Commission had acted reasonably in concluding that no transfer of control occurred, and that it had reasonably concluded that further investigation of FIM's complaint was unnecessary.

Following oral argument, the court of appeals issued a per curiam unpublished opinion affirming the Commission's decision. In its June 8, 1988 decision, the court assumed but did not decide that FIM was "positioned to invoke court review," and concluded that:

> the Commission dealt reasonably and appropriately with the merits of the complaint. The facts before

> the Commission justified the determination that no transfer triggering a need for immediate investigation had occurred. Were agencies forced to prolong inquiries and to spend large resources whenever confronted with allegations, speculation or prediction of the kind petitioner presses, the expeditious scheduling of agency agendas and efficient execution of agency business would be severely impeded.

Fairness in Media v. FCC, No. 87-1217, slip op. at 1 (D.C. Cir. June 8, 1988) (per curiam), *reprinted in* Appendix to Petition for Certiorari at 1a.

REASONS FOR DENYING THE WRIT

As CBS argued before the court of appeals, the Commission's decision not to conduct a further investigation of FIM's complaint involved an unreviewable exercise of agency discretion. Nevertheless, when the court of appeals examined the merits of the case, it correctly found that the Commission's determination was reasonable. The decision in this case is fully consistent with established judicial precedent and the petition fails to raise any important questions of law.

I. The Commission's Decision Not To Conduct a Further Investigation Is Not Properly Subject to Judicial Review.

The FCC's decision not to conduct a further investigation or to institute enforcement action against CBS represents an unreviewable exercise of agency discretion. Judicial review is generally unavailable where action is committed to agency discretion by law. 5 U.S.C. § 701(a) (1982). In this case, the Commission's governing statute leaves to the agency's discretion determinations as to whether and in what circumstances it should initiate investigations or other enforcement actions involving alleged violations of Section 310(d).[5] Because the statute

[5] The statutory authority for Commission investigations and enforcement actions is found in 47 U.S.C. §§ 154(i), 154(j), 312, 401,

does not set forth any standard for the exercise of this discretion, there is no law for the courts to apply in reviewing the Commission's enforcement decisions. Those decisions are thus unreviewable. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (establishing presumption of unreviewability of agency decisions not to take enforcement action).

The *Dunlop* case relied upon heavily by petitioner is inapposite. *See Dunlop v. Bachowski*, 421 U.S. 560 (1975). In a later ruling, this Court characterized *Dunlop* as presenting "an example of statutory language which supplied sufficient standards to rebut the presumption of unreviewability." *Heckler v. Chaney*, 470 U.S. at 834. Unlike the instant case, where the Communications Act commits the decision whether or not to investigate complaints and institute proceedings to the agency's discretion, the statute being administered in *Dunlop* "quite clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power." *Id.*

II. The Court of Appeals Correctly Found That the Commission Reasonably Exercised Its Discretion in This Case.

Assuming *arguendo* that the Commission's determination was reviewable, it is evident that the court of appeals was fully justified in upholding the FCC's decision. The Commission's conclusion that no transfer of control has occurred is reasonable, fully in accord with past precedent, and amply supported by the facts contained in the record of this proceeding. In these circumstances, there was no need for additional investigation of FIM's speculative allegations.

403, and 503 (1982). These sections, which are reprinted in the appendix hereto, do not contain guidelines for the Commission to follow in exercising its discretion.

A. No Transfer of Control of CBS Has Occurred.

Section 310 of the Communications Act provides that no station license shall be

> transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such . . . license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

47 U.S.C. § 310(d) (1982), *reprinted in* Petition for Certiorari at 2.

Because neither Loews Corporation nor Mr. Tisch has acquired any interest that approximates majority ownership of CBS common stock, there is no question here of a transfer of legal or *de jure* control. In examining questions of *de facto* control, the Commission has long recognized that "[t]here is no exact formula by which control is presumed; such a determination must be made on the basis of the facts of each case." *Arthur A. Cirilli*, 3 F.C.C.2d 893, 897 (1966). *See also Committee for Full Value of Storer Communications, Inc.*, 101 F.C.C.2d 434, 440-41, *aff'd sub nom. Storer Communications, Inc. v. FCC*, 763 F.2d 436 (1985) (no "hard and fast rules;" "each case will turn upon its specific facts").

In particular, the Commission has never found that a specific level of stock ownership gives rise to a presumption that a minority shareholder is in *de facto* control of a licensee corporation. Although stock ownership is a factor to be considered, the Commission has stated that determinations in this field "are governed chiefly by the demonstration of [the minority shareholder's] power to dominate the management of the corporate affairs." *Benjamin L. Dubb*, 16 F.C.C. 274, 289 (1951). In this regard, the Commission has recognized that an individual shareholder may have substantial "influence" over cor-

porate decisions without being in a position of *de facto* control. Indeed, to constitute "control" within the meaning of Section 310(d), "[t]he influence must be to the degree that a minority shareholder is able to 'determine' the licensee's policies and operations, or 'dominate' corporate affairs." *News International, PLC*, 97 F.C.C.2d 349, 356 (1984).[6]

Similarly, it has been recognized that individual officers or directors may have substantial power, or "working control," within the corporation without being in *de facto* control. The Commission has stated that "[t]here may be varying degrees of working control exercised at different levels of the corporation [but] each change which may *affect* working control in a corporation does not constitute a *transfer* of control." *Tender Offers and Proxy Contests*, 59 R.R.2d 1536, 1543 (1986) (emphasis in original) (footnote omitted). Accordingly, it is recognized that while "[c]orporate officers or station managers may exercise substantial day-to-day working control; . . . FCC approval would not be required before a corporation was allowed to replace such personnel." *Storer Communications, Inc. v. FCC*, 763 F.2d at 442.

In examining the positions of minority shareholders who also serve as officers or directors, the Commission has

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[6] FIM incorrectly states in its petition that the FCC concluded in 1951 that an 8 percent CBS shareholder, William Paley, controlled the company. *See* Petition for Certiorari at 4. In *Columbia Broadcasting System, Inc.*, 7 R.R. 298 (1951), the Commission found that the acquisition of 26.574 percent of CBS's voting stock by Hytron Radio and Electronics Corp. shareholders did not constitute a transfer of *de facto* control of CBS. The Commission noted that certain directors, including Mr. Paley, had voted "a controlling block of CBS stock at the last three annual stockholders' meetings" through proxies. *Id.* at 299. The three directors discussed in the Hytron case were appointed to serve as proxies by the Board as a whole and, in each instance, the corporation's proxy statements were approved by the Board. Thus, as is the case today, authority within CBS was exercised in 1951 by the Board of Directors on behalf of the shareholders, and not by one individual.

consistently found that such individuals are not in control of licensee corporations where there is no evidence that they have the ability to select a board majority. *E.g., St. Anthony Television Corp.*, 8 F.C.C.2d 294 (1967); *Coral Television Corp.*, 29 F.C.C.2d 286 (Rev. Bd. 1971). In contrast, the agency has found substantial minority shareholders to be in *de facto* control where they have demonstrated that they have the power to select a board majority. *E.g., Metromedia, Inc.*, 98 F.C.C.2d 300 (1984); *TelePrompter Cable Systems, Inc.*, 40 F.C.C.2d 1027 (1973); *WWIZ, Inc.*, 36 F.C.C. 561, 581 (1964).

The record in this case is devoid of anything that would demonstrate that Mr. Tisch has the power to determine a board majority or otherwise dominate its deliberations. More than 75 percent of the voting power and ownership of CBS continues to be in the hands of individuals or institutions which are not in privity with Mr. Tisch. He agreed to accept his own seat on the Board and to act as Chief Executive Officer only after being asked to do so by the Board itself. With the exception of Mr. Wyman, all of the directors who were on the Board when Mr. Tisch was elected continue to serve, and none of these individuals is affiliated with Loews Corporation or Mr. Tisch. Most importantly, as the Commission has noted, "the actions that have taken place [at CBS] have occurred in the context of a corporation that has an active and independent Board of Directors that has been and remains openly antagonistic to CBS coming under the domination of any outside party." *Letter to William S. Paley*, 1 F.C.C. Rcd at 1027, *reprinted in* Appendix to Petition for Certiorari at 9a.

FIM alleges that, following the September 10 board meeting, Mr. Tisch acquired "a dominant voice" over the corporation. Petition for Certiorari at 11. In support of this assertion, FIM refers to a series of personnel changes, cost-reduction measures and divestitures that have occurred at CBS during Mr. Tisch's tenure in office. To

the extent that these changes reflect actions taken by Mr. Tisch in his capacity as Chief Executive Officer, FIM has not shown that they are in any way inconsistent with the authority granted to him by the CBS Board or, indeed, that they are inconsistent with the authority normally exercised by a CEO. In the circumstances where Mr. Tisch's actions as Chief Executive Officer have been subject to Board approval (*e.g.*, the divestiture of various operating divisions), there is no basis for concluding that Mr. Tisch improperly dictated to his colleagues on matters that were determined by action of the full Board of Directors. Indeed, the news clippings referred to by FIM and cited in the Commission's decision reflect the fact that a majority of the Board refused to pursue proposals to sell CBS Records and CBS's magazine division in late 1986, and agreed to authorize the sale of those operations in 1987 only after very substantial price increases were offered. Thus, the record before the Commission and the court of appeals demonstrated that this Board of Directors has exercised the kind of independent judgment that is inconsistent with Loews or Mr. Tisch having the power to "determine" or "dominate" the actions of the Board.

B. Further Investigation of FIM's Complaint Was Unnecessary.

As the FCC explained in its brief before the court of appeals, this is not a case where an agency has stubbornly refused to look into a matter that was brought to its attention by a complaining party. Instead, "the Commission conducted its own inquiry which elicited a detailed, and essentially undisputed, explanation of the relevant facts." Brief for Respondent Federal Communications Commission at 37, *Fairness in Media v. FCC*, No. 87-1217 (D.C. Cir. June 8, 1988). In reply to this inquiry, CBS submitted a thorough response. While FIM objects to the fact that these materials were supplied by

the licensee itself, the Commission routinely relies on factual representations made by licensees. As the Court of Appeals for the District of Columbia Circuit has stated, it would be a "regulatory nightmare" to employ discovery procedures in thousands of licensing proceedings in an effort to test the veracity of such representations. *Bilingual Bicultural Coalition v. FCC*, 595 F.2d 621, 634 (1978) (en banc). Moreover, it is clear that such efforts are not necessary:

> Ample sanctions exist for false statements knowingly made to the Commission, and licensees are well aware of their duty, not only to avoid positive untruths, but to "be scrupulous in providing complete and meaningful information."

Id. at 635 (footnotes omitted).[7]

Furthermore, to the extent that FIM asks the agency to seek out the advice of various purported "experts" on

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[7] Notwithstanding the obvious reasonableness of the FCC's decision, FIM argues that the court's judgment was arbitrary because it relied in part on factors not mentioned by the FCC in its ruling. Petition for Certiorari at 10. Specifically, FIM claims the court erred by noting that the agency's efficiency would be severely impaired if the FCC were required to conduct a more elaborate investigation into speculative claims than that which was undertaken here.

However, contrary to FIM's implication, the court's finding that the agency was not required to rely on speculation and conjecture in deciding whether to pursue the investigation merely echoed the FCC's references to this principle in its decision below. *See* CBS Inc., 2 F.C.C. Rcd at 2274, *reprinted in* Appendix to Petition for Certiorari at 12a, 13a ("conjecture . . . is not a basis for determining control;" "FIM's characterization of the CBS Directors as powerless . . . is not supported by the evidence"). Even in licensing proceedings where the FCC's discretion *is* limited by statute, it has been recognized that evidentiary proceedings are not necessary when the essential facts are undisputed and the disposition of a petitioner's claims turns on inferences to be drawn from these facts. National Ass'n for Better Broadcasting v. FCC, 591 F.2d 812, 815 (1978) (citing Alianza Federal De Mercedes v. FCC, 539 F.2d 732, 736 (1976)).

matters of corporate control (*See* Petition for Certiorari at 8), its proposal overlooks the fact that the Commission itself is the recognized expert agency for determining when a transfer of control has occurred within the meaning of its governing statute. In this regard, "[i]t is well-established that an agency's interpretation of its own statute is entitled to great deference and 'should be followed unless there are compelling indications that it is wrong.'" *Storer Communications, Inc. v. FCC*, 763 F.2d at 440 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)).

In this situation, where the agency had the benefit of a detailed report of relevant events and circumstances (and where the pertinent facts were essentially undisputed), it is clear that the Commission acted reasonably in concluding that no further inquiry or "investigation" was necessary. Thus, the court of appeals was fully justified in concluding that "no transfer triggering a need for immediate investigation had occurred." *Fairness in Media v. FCC*, No. 87-1217, slip op. at 1, *reprinted in* Appendix to Petition for Certiorari at 1a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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October 3, 1988

STATUTORY APPENDIX

STATUTORY APPENDIX

5 U.S.C. Section 701(a) (1982)

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

47 U.S.C. Sections 154(i) and (j) (1982)

(i) Duties and Powers

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

(j) Conduct of proceedings; hearings

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

47 U.S.C. Section 312 (1982 and 1988 U.S.C.A. Supp.)

Administrative Sanctions

(a) Revocation of station license or construction permit

The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

(6) for violation of section 1304, 1343, or 1464 of Title 18; or

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) Cease and desist orders

Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter, or section 1304, 1343, or 1464 of title 18, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Order to show cause

Before revoking a license or permit pursuant to subsection (a) of this section, or issuing a cease and desist order pursuant to subsection (b) of this section, the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order or revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) Burden of proof

In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidenec and the burden of proof shall be upon the Commission.

(e) Procedure for issuance of cease and desist order

The provisions of section 558(c) of title 5 which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, or any proceeding for the issuance of a cease and desist order.

(f) Willful or repeated violations

For purposes of this section:

(1) The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States.

(2) The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

47 U.S.C. Section 401 (1982 and 1988 U.S.C.A. Supp.)

Enforcement of chapter and orders of Commission; jurisdiction

(a) Jurisdiction

The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.

(b) Orders of Commission

If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was

regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(c) Upon the request of the Commission it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

47 U.S.C. Section 403 (1982)

Inquiry by Commission on its own motion

The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, expecting orders for the payment of money.

47 U.S.C. Section 503 (1982 and 1988 U.S.C.A. Supp.)

Forfeitures

(a) Rebates and offsets

Any person who shall deliver messages for interstate or foreign transmission to any carrier, or for whom as sender or receiver, any such carrier shall transmit any interstate or foreign wire or radio communication, who shall knowingly by employee, agent, officer or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transmission of such messages as fixed by the schedules of charges provided for in this chapter, shall in addition to any other penalty provided by this chapter forfeit to the United States a sum of money three times the amount of money so received or accepted and three time the value of any other consideration so received or accepted, to be ascertained by the trial court; and in the trial of said action all such rebates or other considerations as received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

(b) Activities constituting violations authorizing imposition of forfeiture penalty; amount of penalty; procedures applicable; persons subject to penalty; liability exemption period

(1) Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have—

(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any li-

cense, permit, certificate, or other instrument or authorization issued by the Commission;

(B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;

(C) violated any provision of section 317(c) or 509(a) of this title; or

(D) violated any provision of section 1304, 1343, or 1464 of Title 18;

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this chapter; except that this subsection shall not apply to any conduct which is subject to forfeiture under subchapter II of this chapter, part II or III of subchapter III of this chapter, or section 507 of this title.

(2) The amount of any forfeiture penalty determined under this subsection shall not exceed $2,000 for each violation. Each day of a continuing violation shall constitute a separate offense, but the total forfeiture penalty which may be imposed under this subsection, for acts or omissions described in paragraph (1) of this subsection and set forth in the notice or the notice of apparent liability issued under this subsection, shall not exceed—

(A) $20,000, if the violator is (i) a common carrier subject to the provisions of this chapter, (ii) a broadcast station licensee or permittee, or (iii) a cable television operator; or

(B) $5,000, in any case not covered by subparagraph (A).

The amount of such forfeiture penalty shall be assessed by the Commission, or its designee, by written

notice. In determining the amount of such a forfeiture penalty, the commission or its designee shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

(3)(A) At the discretion of the Commission, a forfeiture penalty may be determined against a person under this subsection after notice and an opportunity for a hearing before the Commission or an administrative law judge thereof in accordance with section 554 of Title 5. Any person against whom a forfeiture penalty is determined under this paragraph may obtain review thereof pursuant to section 402(a) of this title.

(B) If any person fails to pay an assessment of a forfeiture penalty determined under subparagraph (A) of this paragraph, after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the Commission, the Commission shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the forfeiture penalty shall not be subject to review.

(4) Except as provided in paragraph (3) of this subsection, no forfeiture penalty shall be imposed under this subsection against any person unless and until—

(A) the Commission issues a notice of apparent liability, in writing, with respect to such person;

(B) such notice has been received by such person, or until the Commission has sent such notice to the last known address of such person, by registered or certified mail; and

(C) such person is granted an opportunity to show, in writing, within such reasonable period of time as the Commission prescribes by rule or regulation, why no such forfeiture penalty should be imposed.

Such a notice shall (i) identify each specific provision, term, and condition of any Act, rule, regulation, order, treaty, convention, or other agreement, license, permit, certificate instrument, or authorization which such person apparently violated or with which such person apparently failed to comply; (ii) set forth the nature of the act or omission charged against such person and the facts upon which such charge is based; and (iii) state the date on which such conduct occurred. Any forfeiture penalty determined under this paragraph shall be recoverable pursuant to section 504(a) of this title.

(5) No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, unless, prior to the notice required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged; (B), is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission which is nearest to such person's place of residence; and (C) subsequently engages in conduct of the type described in such citation. The provisions of this paragraph shall not apply, however, if the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required, or is a cable television system operator or if the person involved is transmitting on frequencies assigned for use in a service in which individual station operation is authorized by rule pursuant to section 307(e) of this title. Whenever the requirements of this paragraph are satisfied with respect to a particular

person, such person shall not be entitled to receive any additional citation of the violation charged, with respect to any conduct of the type described in the citation sent under this paragraph.

(6) No forfeiture penalty shall be determined or imposed against any person under this subsection if—

(A) such person holds a broadcast station license issued under subchapter III of this chapter and if the violation charged occurred—

(i) more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or

(ii) prior to the date of commencement of the current term of such license,

whichever is earlier so long as such violation occurred within 3 years prior to the date of issuance of such required notice; or

(B) such person does not hold a broadcast station license issued under subchapter III of this chapter and if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability.